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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD MUNOZ, JR.,

Defendant and Appellant.

C069790

(Super. Ct. No. 10F06036)

While serving an indeterminate sentence in state prison, guards stopped defendant Richard Munoz, Jr., as he pushed a cart of his belongings while moving between cells. After guards found a green leafy substance in defendant's belongings, defendant gave a urine sample that tested positive for a metabolite of marijuana. An information charged defendant with knowingly possessing marijuana while incarcerated. (Pen. Code, § 4573.6.)¹ A jury found defendant guilty, and the court sentenced him to two years in

¹ All further statutory references are to the Penal Code unless otherwise designated.

state prison and imposed a restitution fine. On appeal, defendant challenges the admissibility of the urinalysis evidence. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

An information charged defendant with knowingly possessing marijuana while incarcerated in state prison. During the jury trial, the court granted the prosecution's in limine motion to admit urinalysis evidence. The court admitted the evidence for the purpose of showing the results and not to show any propensity or tendency to possess marijuana. The following evidence was introduced at trial.

In 2010 defendant was serving a sentence in state prison for a prior conviction. While moving from one cell to another, defendant pushed a cart containing his personal belongings. As defendant approached a gate between the prison's main yard and several buildings, Correctional Officer Steven Novikoff checked defendant's identification card. Another inmate helped defendant move the cart.

Novikoff was responsible for inspecting inmates' property when they passed through the prison gate. Prior to defendant's passing through the gate, Novikoff instructed him to submit to a search of the cart. While defendant stood to one side, Novikoff searched the cart. Some of the items were marked with defendant's name; others bore the name of his cellmate, Carrizosa.

Novikoff's search unearthed several unauthorized items, including a metal locker and cigarette lighters. As the search progressed, Navikoff found plastic wrap rolled up in a bindle and wrapped in a paper towel. Inside, Novikoff found a green leafy substance. Novikoff showed the bindle to a fellow correctional officer, Patrick Garrity, who confirmed it looked like a green leafy substance.

Novikoff asked defendant, "Is this your marijuana?" Defendant shrugged and said, "Yeah, it's mine." Garrity noticed defendant did not appear surprised when Navikoff asked about the marijuana. Garrity handcuffed defendant and took him to a holding cell.

Novikoff took the bindle to the prison's custody complex. He did not contact defendant's cellmate, Carrizosa, about the marijuana. Novikoff admitted that under normal circumstances he would be searching an individual inmate's property; it was unusual to search property where some belonged to one inmate and some belonged to another inmate.

Later that day, another correctional officer collected urine samples from both defendant and his cellmate, Carrizosa. A criminalist who conducted a urinalysis on both samples testified both samples contained 11-nor-9-carboxy-THC, a metabolite of marijuana.

The parties stipulated to the results of the urinalysis, a stipulation which was read to the jury. The stipulation stated: "Detection of 11-nor-9-carboxy-THC in urine generally indicates use of marijuana within 1-3 days. However, the metabolite may be detected in the urine for weeks in heavy, chronic users." The court instructed the jury that the urinalysis evidence was admitted for the purpose of showing the results, and not to show any propensity or tendency to possess marijuana.

Another criminalist, after performing a series of laboratory tests, confirmed the green leafy substance found in the bindle was marijuana. The criminalist determined that the amount of marijuana in the bindle was 0.17 gram, a usable amount of marijuana.

Defense

Defendant was convicted of a crime of moral turpitude in 1997 at the age of 16 and had been incarcerated since then. At the time of trial, defendant was 32 years old. His first parole hearing is to take place in 2019.

In August 2010 defendant and his cellmate, whom defendant referred to as Patrick Cardoza, were directed to move into a new cell in a different building.² Defendant and

² Defendant alleges Patrick Cardoza is the person sometimes referred to in the record as "Carrizosa."

his cellmate loaded items from their cell onto a cart to facilitate the move. Defendant, with the help of another inmate, moved the cart. Defendant's cellmate's disability prevented him from helping to move the cart.

Defendant did not inspect his cellmate's belongings before loading them onto the cart. Defendant did not know the marijuana was in the cart when Novikoff stopped him and searched it. Defendant was familiar with marijuana and used it in prison.

Defendant described the search. Novikoff removed several items from the cart. When Novikoff removed an item from the cart that defendant recognized as marijuana, he asked defendant if it was his. Defendant responded quickly; he shrugged and smiled and told Novikoff the marijuana belonged to him. Defendant testified that when Novikoff asked him, he just reacted. He was lying when he said the marijuana was his.

Defendant falsely said the marijuana was his because he was adhering to the "single most important rule" in prison, the no-"snitching" rule enforced by fellow inmates. Defendant also lied because he did not want to get anyone else in trouble and feared being beaten or harmed if he told the truth. Other inmates were watching the search. Defendant smiled when questioned by Novikoff because he was not surprised that Novikoff found marijuana in the cart.

Defendant continued the disciplinary hearing for a violation of prison rules while the charges were pending. If he was found in violation of the rules, that would affect various privileges and make it more difficult to be paroled. However, the parole hearing would not take place for nine years, and defendant did not expect to be paroled at the first hearing. Defendant believed the consequences of snitching would be much worse; he feared for his safety in prison.

Defendant's cellmate was transferred to another facility after defendant's arrest. Defendant "never had the opportunity" to deny ownership of the marijuana once his cellmate left the prison, and in any event, he would not do that because "[t]elling is telling." The person who would come after him for telling would not necessarily be the

person who was “snitch[ed] on.” Defendant testified that he had used marijuana in the past but had never been caught.

The jury found defendant guilty as charged. The court sentenced defendant to two years in state prison. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant challenges the trial court’s admission at trial of the urinalysis test. According to defendant, the court abused its discretion because the evidence constituted improper character evidence and was unduly prejudicial.

Background

At the motion in limine hearing, defense counsel objected to the admission of the urinalysis evidence under Evidence Code section 1101, as improper character evidence. Defense counsel noted that no quantitative analysis was performed, proving only that defendant and his cellmate ingested marijuana, not that they possessed the marijuana on the cart.

The prosecution offered the evidence as circumstantial evidence of possession and of defendant’s knowledge of the presence of the substance. The prosecution theorized that the evidence also benefitted the defense because it revealed that defendant’s cellmate also tested positive. Defense counsel objected to the use of the urinalysis results to show knowledge but offered to stipulate that defendant was familiar with marijuana.

The court requested, and the parties provided, a stipulation that the tests revealed the presence of a metabolite of marijuana. The court allowed the evidence for the limited purpose of its relevance to possession and not for showing defendant had a predisposition to commit the crime. The trial court noted the evidence could be viewed as character evidence, but found the test results were relevant and material to the case. In addition, the court found that a jury instruction informing the jurors the evidence could only be used to determine possession would be appropriate.

During its deliberations, the jury sent the court a note stating, in part: “We, the jury in the above entitled action, request the following: [¶] 1.) A clarification of item #2 of page 22 as to the specific time that the sta[t]ement applies. Substance’s presence in the cart @ time of search or substance presence @ any time that day on August 4th, 2010, or at any time at all.”

The court determined the note referred to page 22 of the jury instructions, which contained CALCRIM No. 2748, stating the elements required to establish a violation of section 4573.6.³ The second element on page 22 read: “The defendant knew of the substance’s presence.” The jury’s question concerned the court since it might indicate confusion over how to consider the urinalysis evidence. However, the court also noted that both parties had discussed the proper consideration of the urinalysis evidence during closing arguments in an effort to clarify the issue. Finally, the court postulated that the jury’s question might not even pertain to the urinalysis evidence.

The court proposed querying the jury further to clarify the question. Defense counsel asked the court to stop jury deliberations until the jury was able to answer the clarification request. The court agreed, but before it could advise the jury, the jury reached its verdict. The jury also returned a response to the court’s request for further clarification of the prior question, stating: “The answers to these questions are no longer needed.”

³ CALCRIM No. 2748, as presented to the jury, stated in part: “The defendant is charged with possessing Marijuana, a controlled substance, in a penal institution in violation of Penal Code section 4573.6. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant possessed a controlled substance in a penal institution; [¶] 2. The defendant knew of the substance’s presence; [¶] 3. The defendant knew of the substance’s nature or character as a controlled substance; [¶] 4. The controlled substance that the defendant possessed was Marijuana; [¶] and [¶] 5. The controlled substance was a usable amount.”

Discussion

Under Evidence Code section 352, a trial court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate an undue consumption of time or create a substantial danger of undue prejudice by confusing the issues or misleading the jury. The trial court has broad discretion in deciding whether the probative value of evidence is substantially outweighed by the potential danger of prejudice. (*People v. Holford* (2012) 203 Cal.App.4th 155, 167-168.) We review the court's decision for an abuse of discretion. (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

Evidence Code section 1101, subdivision (a) provides that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Section 1101, subdivision (b) allows for the admission that a person committed a crime, civil wrong, or other act when relevant to prove some fact other than the person's disposition to commit such an act.

Defendant argues the urinalysis evidence amounted to evidence of a separate, uncharged crime of possessing marijuana in prison. Therefore, according to defendant, the court's admission of the evidence must meet the higher "substantial probative value" standard applied to evidence of uncharged crimes.

We disagree with defendant's analysis. The urinalysis test result provides circumstantial evidence that defendant possessed marijuana while in prison. The urinalysis evidence was not introduced to support the uncharged crime of possession. The court instructed the jury to consider the evidence only for the purpose of showing results, *not* to establish possession. Therefore, we consider whether the court abused its discretion in admitting the evidence under Evidence Code section 352, not the more stringent standard under Evidence Code section 1101.

Defendant argues the prosecution's argument that the evidence is relevant runs afoul of our decision in *People v. Spann* (1986) 187 Cal.App.3d 400 (*Spann*). In *Spann*, an inmate defendant was observed to be under the influence and Valium was found in his system. This evidence was used to prove he possessed a narcotic in jail in violation of section 4573.6. (*Spann*, at pp. 401-402.) The sole proof that the defendant possessed the Valium was the presence of it in his body. (*Id.* at p. 403.) We reversed and found the use of a controlled substance does not establish possession under section 4573.6 (*Spann*, at pp. 408-409), and "mere evidence of use (or being under the influence) of a proscribed substance cannot circumstantially prove its 'possession.' " (*id.* at p. 408).

Defendant argues the same situation exists in the present case, and therefore evidence of his prior use of marijuana cannot be used to establish that he had possession of the marijuana found in the search. We disagree.

Here, unlike the facts we encountered in *Spann*, other evidence supported a finding that defendant knowingly possessed the marijuana found in the cart. When confronted by Novikoff, defendant confessed the drugs belonged to him. The drugs were found in a cart containing defendant's possessions and under defendant's control. In *Spann*, we did not hold that evidence of the defendant's use of a drug lacked all probative value in establishing the element of possession. Instead, we found "mere evidence of use" cannot circumstantially prove its possession.

Prior to admission of the evidence, the trial court instructed the jury that the "evidence is admitted for the purpose of showing the results and it is not admitted to show any propensity or tendency to possess marijuana." The instruction insured that the jury would consider the urinalysis test only as evidence of possession and knowledge, and lessened any possible prejudice from its admission.

The urinalysis evidence provided just one piece of circumstantial evidence of possession and knowledge, and was therefore probative on these issues. The court's instruction limited any possible prejudice from its admission. Given the facts, we cannot

find the trial court abused its discretion under Evidence Code section 352 in finding the urinalysis test results admissible.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

ROBIE, J.